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No. 92-6073

In The
Supreme Court of the United States
October Term, 1992

RICHARD LYLE AUSTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed September 30, 1992
Certiorari Granted January 15, 1993

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U.S. DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
(SOUTHERN DIVISION)

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/7/90	Verified Complaint for Forfeiture.
9/21/90	Claim by claimant Richard Lyle Austin.
10/11/90	Answer by claimant Richard Lyle Austin to Verified Complaint.
2/4/91	Motion by plaintiff USA for summary judgment.
4/8/91	Order by John B. Jones granting motion for summary judgment.
6/7/91	Notice of Appeal by claimant Richard Lyle Austin from Dist. Court decision.
6/18/91	Decree of Forfeiture by John B. Jones.
6/20/91	Motion by claimant Richard Lyle Austin to stay sale of defendant property.
6/20/91	Affidavit of Richard L. Johnson in support of Motion to Stay Sale of Defendant Property.
12/24/91	Order by John B. Jones granting motion to stay sale of defendant property.
7/6/92	Order from 8th Circuit COA Denying Petition for Rehearing and Suggestion for Rehearing En Banc.
7/13/92	Opinion from 8th Circuit COA affirming the decision of the District Court.
7/13/92	Mandate from 8th Circuit Court of Appeals affirming the decision of the District Court.

8/28/92 Motion by Plaintiff USA for order lifting the order of this court dated 12/24/91.

9/4/92 Order by John B. Jones granting motion for order lifting the order of this court dated 12/24/91.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

UNITED STATES OF
AMERICA,

Plaintiff,

vs.

ONE PARCEL OF PROPERTY
LOCATED AT 508 DEPOT
STREET, GARRETSON,
MINNEHAHA COUNTY,
SOUTH DAKOTA, WITH ALL
APPURTENANCES AND
IMPROVEMENTS THEREON,
and ONE 1972 HMET MOBILE
HOME WITH SERIAL
NUMBER 0356509G, WITH
ALL APPURTENANCES AND
IMPROVEMENTS THEREON,

Defendants.

CIV: 90-4133

VERIFIED
COMPLAINT
OF FORFEITURE

(Filed
September 7, 1990)

Now comes plaintiff, the United States of America, by and through one of its attorneys, Mary T. Wynne, Assistant United States Attorney for the District of South Dakota, and respectfully states as follows:

1. This is a civil action *in rem* brought to enforce the provision of 21 U.S.C. § 881(a)(7) for the forfeiture of real property which was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of 21 U.S.C. §§ 801 *et seq.*, punishable by

more than one year's imprisonment, and 21 U.S.C. § 881(a)(4) for the forfeiture of conveyances which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of a controlled substance, in violation of Title II of the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.*

2. This Court has jurisdiction over this matter by virtue of 28 U.S.C. §§ 1345 and 1355.

3. The defendant is a parcel of property located at 508 Depot Street, Garretson, Minnehaha County, South Dakota, with all appurtenances and improvements thereon, more particularly described in Exhibit A which is appended hereto and fully incorporated herein by reference, and a 1972 mobile home, serial number 0356509G, located at 302 Dows Street, Garretson, South Dakota.

4. The defendant real property was acquired by the Garretson Body Shop, Inc., from Kenneth and Gertrude Barstead on or about May 11, 1982, for \$20,000, by Warranty Deed recorded at Book 353, page 378 of the Minnehaha County Register of Deeds land records. On October 21, 1985, said corporation was cancelled by the South Dakota Secretary of State's office.

5. The defendant property is valued at approximately \$33,600.00.

6. The defendant mobile home was acquired by Richard Austin, a/k/a Dick Austin, on or about September 21, 1977, as reflected by the Certificate of Title, attached hereto as Exhibit C.

7. The defendant mobile home is valued at approximately \$3,000.00.

8. The facts and circumstances supporting the seizure and forfeiture of the defendant property are contained in Exhibit B which is attached hereto and fully incorporated herein by reference.

9. The defendant one parcel of property located at 508 Depot Street, Garretson, South Dakota, with all appurtenances and improvements thereon, and the defendant mobile home are property which were used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of Title II of the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.*, punishable by more than one (1) year's imprisonment, and are, therefore, subject to forfeiture to the United States pursuant to 21 U.S.C. § 881(a)(7) and § 881(a)(4).

WHEREFORE, the United States of America prays that a warrant for arrest for the defendant one parcel of property located at 508 Depot Street, Garretson, Minnehaha County, South Dakota, with all appurtenances and improvements thereon, and the defendant 1972 HMET mobile home, be issued; that due notice be given to all parties to appear and show cause why the forfeiture should not be decreed; that judgment be entered declaring the defendant property to be condemned and forfeited to the United States of America for disposition according to law; and that the United States of America be granted such other and further relief as this Court may deem just and proper, together with the costs and disbursements of this action.

Dated this 6th day of September, 1990.

Philip N. Hogen
United States Attorney

/s/ Mary T. Wynne
Mary T. Wynne
Assistant United States Attorney
P.O. Box 1073
Sioux Falls, South Dakota 57102
(605) 330-4400

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

(Caption Omitted In Printing)

CIV: 90-

AFFIDAVIT OF DONALD SATTERLEE

STATE OF SOUTH DAKOTA)
: ss
COUNTY OF MINNEHAHA)

Donald L. Satterlee being first duly sworn on oath
deposes and states as follows:

1. Affiant is a police officer with the Sioux Falls Police Department for 5 1/2 years, and a narcotics detective for 1 year.

2. Information was received that Richard Lyle Austin, on April 24, 1990, bought a 1985 blue, Escort station wagon, license 1GT324. The reason Austin needed to buy the Escort is because he was going to drive to California. He bought the station wagon from Nordstrom's Recycling in Garretson, South Dakota, and told Nordstrom's when he gave them a check for the vehicle that he didn't want the check cashed until he came back from California because he was going to come into some money.

3. On June 13, 1990, a cooperating individual, with a Keith Allen Engebretson, drove to the Garretson Body Shop at 508 Depot Street, which is run by Austin, to purchase one gram of cocaine. Keith Engebretson went into the body shop and transacted a deal with Austin for

the cocaine. Austin then went from the body shop to his trailer, a 1972 HMET-mobile home bearing serial number 0356509T, located at 302 Dows Street, Garretson, South Dakota, came back and met Keith Engebretson at the body shop, and exchanged two gram [sic] of cocaine for an unknown amount of money.

4. Keith Engebretson has been convicted for possession of a controlled substance and is a known narcotic user.

5. A search warrant was then obtained on June 14, 1990, and a search of the body shop and mobile home above described was conducted on June 14, 1990. Marijuana and cocaine, drug paraphernalia, a weapon, and currency of approximately \$4,700 was found as listed on the Return of Search Warrant and Inventory, attached hereto as Exhibit 1.

/s/ Donald L. Satterlee
Donald L. Satterlee

Subscribed and sworn to before me,
this 5th day of September, 1990.

/s/ Dawn Z. Hartigan
NOTARY PUBLIC * SOUTH DAKOTA
My Commission expires: Dec. 10, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

(Caption Omitted In Printing)

CIV: 90-4133

ANSWER OF OWNER AND CLAIMANT

Comes now Richard Lyle Austin, (hereinafter known as "Claimant"), the owner of and claimant to the above-described property, and for his Answer to the Verified Complaint of Forfeiture of the Plaintiff, alleges and states as follows:

I.

Claimant denies each and every allegation, matter, and thing contained in the Verified Complaint of Forfeiture of the Plaintiff, except those matters herein specifically admitted or modified.

II.

Plaintiff's Verified Complaint fails to state a claim against the above-described property upon which relief can be granted.

III.

Claimant admits paragraphs No. 3 and No. 6 of the Plaintiff's Verified Complaint.

IV.

Claimant is without sufficient information to admit or deny paragraphs No. 5 or No. 7 of Plaintiff's Verified Complaint.

V.

Claimant states that he is the owner of one parcel of property located at 508 Depot Street, Garretson, Minnehaha County, South Dakota, with all appurtenances and improvements thereon, and one 1972 HMET mobile home with Serial Number 0356509G, with all appurtenances and improvements thereon, the above-described property; and Claimant incorporates by this reference, with the same force and effect as if set forth in its entirety, his Claim, dated September 21, 1990, a copy of which is attached hereto and marked Exhibit #1.

VI.

As an affirmative defense, Claimant states that Plaintiff should be denied that relief requested in its Verified Complaint of Forfeiture, because Plaintiff is requesting relief which procedurally and substantively denies Claimant due process of law in violation of the Fifth Amendment to the United States Constitution and in violation of laws in effect pursuant to said Amendment.

VII.

As a further affirmative defense, Claimant alleges and states that the above-described property is not property which is subject to forfeiture or seizure within the meaning of the applicable laws.

VIII.

As a further affirmative defense, Claimant states that this seizure and forfeiture proceeding denies Claimant

the right against double jeopardy, in violation of the Fifth Amendment to the United States Constitution.

IX.

As a further affirmative defense, Claimant alleges and states that the present seizure and forfeiture proceeding permits criminal punishment by a civil burden of proof and switches and the burden of proof, requiring Claimant to prove his innocence, in violation of the Fifth and Sixth Amendments to the United States Constitution.

X.

As a further affirmative defense, Claimant alleges and states that the Court does not have subject matter jurisdiction of these proceedings.

WHEREFORE Claimant prays that the Plaintiff's Verified Complaint be dismissed upon its merits and with prejudice, and that the Claimant have and recover his costs and disbursements herein.

Dated at Sioux Falls, South Dakota, this 11th day of October, 1990.

/s/ Richard Lyle Austin
Richard Lyle Austin, Claimant

/s/ Richard L. Johnson
Richard L. Johnson
Attorney for Claimant
101 South Main Avenue, Suite 305
Sioux Falls, South Dakota 57102
Phone (605) 338-2626

DEMAND FOR JURY TRIAL

Comes now the Claimant, Richard Lyle Austin, and hereby demands a trial by jury on all issues in the above-entitled matter.

Dated at Sioux Falls, South Dakota, this 11th day of

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

(Caption Omitted In Printing)

CIV: 90-4133

AFFIDAVIT OF DONALD SATTERLEE

STATE OF SOUTH DAKOTA)

: ss

COUNTY OF MINNEHAHA)

Donald L. Satterlee being first duly sworn on oath deposes and states as follows:

1. Affiant is a police officer with the Sioux Falls Police Department for 5 1/2 years, and a narcotics detective for 1 year.

2. Information was received that on April 24, 1990, Richard Lyle Austin bought a 1985 blue, Escort station wagon, license 1GT324. The reason Austin needed to buy the Escort is because he was going to drive to California. He bought the station wagon from Nordstrom's Recycling in Garretson, South Dakota, and told Nordstrom's when he gave them a check for the vehicle that he didn't want the check cashed until he came back from California because he was going to come into some money.

3. On June 13, 1990, a cooperating individual, with a Keith Allen Engebretson, drove to the Garretson Body Shop at 508 Depot Street, which is run by Austin, to purchase one gram of cocaine. Keith Engebretson went into the body shop and transacted a deal with Austin for

the cocaine. Austin then went from the body shop to his trailer, a 1972 HMET-mobile home bearing serial number 0356509T, located at 302 Dows Street, Garretson, South Dakota, came back and met Keith Engebretson at the body shop, and exchanged two gram [sic] of cocaine for an unknown amount of money.

4. Keith Engebretson has been convicted for possession of a controlled substance and is a known narcotic user.

5. A search warrant was then obtained on June 14, 1990, and a search of the body shop and mobile home above described was conducted on June 14, 1990. Marijuana, cocaine, a weapon, drug paraphernalia, and currency of approximately \$4,700 were found as listed on the Return of Search Warrant and Inventory, attached hereto as Exhibit 1.

6. Based upon the above sale of cocaine occurring at the Garretson Body Shop, Richard Lyle Austin was indicted on two counts of possession of cocaine, maintaining a place for keeping or selling drugs, and one count of possession of marijuana on August 2, 1990.

7. On October 23, 1990, Richard Austin admitted to the distribution and possession as charged in open court, and pled guilty in the Second Judicial Circuit state court to possession with intent to distribute cocaine. Said guilty plea was the result of the investigation as set forth above.

8. Austin was found guilty and sentenced to seven years in the state penitentiary on January 28, 1991. See certified copy of judgment attached as Exhibit 2.

/s/ Donald L. Satterlee
Donald L. Satterlee

Subscribed and sworn to before me,
this 1st day of February, 1991.

/s/ Thomas J. Wright
NOTARY PUBLIC • SOUTH DAKOTA
My Commission expires: 6-27-92

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

(Caption Omitted In Printing)

CIV. 90-4133

AFFIDAVIT OF
RICHARD LYLE AUSTIN

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF MINNEHAHA)

RICHARD LYLE AUSTIN, being first duly sworn, on oath deposes and states as follows:

1. That I am the Owner of the above-described Defendant property, Garretson Body Shop, located at 508 Depot Street in Garretson, South Dakota, with all appurtenances and improvements thereon, and the 1972 HMET mobile home, located at 302 Dows Street in Garretson, South Dakota; and I make this Affidavit in opposition to the Plaintiff's Motion for Summary Judgment.

2. I am the Owner of the 1972 HMET mobil home, with serial number 035609G, located at 302 Dows Street in Garretson, South Dakota. This mobile home is larger than 240 square feet, measuring at the base thereof, and it is registered in South Dakota. This mobile home is by homestead, because I use it as my home. Although I am presently incarcerated in the South Dakota State Penitentiary, my mobile home at 302 Dows Street remains my home for homestead purposes. I intend to return to the mobile home after I am released from the Penitentiary,

and I consider the mobile home to be my home at this time.

3. That the H & R .22 caliber revolver which was seized by the officers from my shop safe was filled with bird shot when it was seized. I only use this gun to shoot sparrows in my body shop.

4. The Garretson Body Shop, located at 508 Depot Street in Garretson, South Dakota, is my business and my livelihood. I have been in the auto body business for approximately 25 years; and the Garretson Body Shop represents my only means to earn a living at this time. I intend to return to Garretson to live and work at the Garretson Body Shop when I am released from prison.

5. Contrary to the allegations in Donald Satterlee's Affidavit, no money was given to me by Keith Engebretson in the Body Shop on June 13, 1990.

WHEREFORE, Affiant respectfully requests that the Court deny the Plaintiff's Motion for Summary Judgment in this matter, and that the Court grant Affiant a jury trial, since there are genuine issues of material fact to be decided by the trier of fact in this forfeiture action.

Dated at Sioux Falls, South Dakota, this 25 day of February, 1991.

/s/ Richard Lyle Austin
Richard Lyle Austin
Owner and Claimant

Subscribed and sworn to before me this 25th day of
February, 1991.

/s/ Richard L. Johnson
Notary Public - South Dakota

MY COMMISSION EXPIRES: 1-23-94

(SEAL)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

(Caption Omitted In Printing)

Docket No. 90-4133

Sioux Falls, South Dakota

April 8, 1991[sic]

10:00 o'clock a.m.

TRANSCRIPT OF HEARING ON MOTION
BEFORE THE HONORABLE JOHN B. JONES

[12] * * *

THE COURT: The Congress has determined that as a policy matter that one of the means of attacking the drug business is to forfeit property that has any connection with the drug business and it is the view of the Court that these forfeiture laws do not violate any constitutional rights of the Claimant and do not constitute excessive fines or cruel and unusual punishment.

I also find that the civil forfeiture action does not constitute a second prosecution thereby violating Fifth Amendment claims against double jeopardy.

The plaintiff's Motion for Summary Judgment raises the factual issue of whether or not there is sufficient connection between the property sought to be forfeited and the Defendant's involvement in the drug business to permit forfeiture under the Federal Forfeiture Acts. In this case the Defendant pled guilty to one transaction, one drug transaction, which occurred at the business property at the body-shop. Subsequent thereto, Search Warrants were executed on both the body-shop and the

residence consisting of the trailer-house. Small quantities of drugs and a scale, were found at the residence, along with cash. Cash and small quantities of drugs were found in the business property. The fact that there were no large quantities of drugs found in [13] either place does not defeat the forfeiture.

The Court views what the resolver [sic] was used for might have some impact on a criminal prosecution, but it doesn't have any impact either way in this civil forfeiture action.

The Court finds that from the undisputed facts in this case that there is a sufficient nexus between the Defendant's drug transactions and the two parcels of real estate to permit their forfeiture under 21 U.S.C. 881.

The plaintiff's Motion for Summary Judgment will, therefore, be granted.

The Court will be in recess.

United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Appellee,
v.

ONE PARCEL OF PROPERTY LOCATED AT 508 DEPOT STREET, GARRETSON, MINNEHAHA COUNTY, SOUTH DAKOTA, with all appurtenances and improvements thereon; HMET Mobile Home 1972 with Serial Number 0356509G, with appurtenances and improvements thereon, Defendants-Appellants,

Richard Lyle Austin, Claimant-Appellant.

No. 91-2382SD.

Submitted March 13, 1992.

Decided May 20, 1992.

Rehearing and Rehearing En Banc

Denied July 2, 1992.

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and LOKEN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Richard Lyle Austin appeals the district court's¹ order granting the government's motion for summary judgment in this civil forfeiture action. We affirm.

¹ The Honorable John B. Jones, United States District Judge for the District of South Dakota.

I. BACKGROUND

On June 13, 1990, Keith Engebretson met Austin at Austin's auto body shop and agreed to purchase some cocaine. After reaching an agreement with Engebretson, Austin left the body shop, went to his mobile home, and then returned to the body shop, at which time he sold Engebretson two grams of cocaine. The next day, state law enforcement officers executed search warrants at the body shop and at the mobile home. The search of the body shop uncovered a twenty-two caliber revolver, some marijuana, and \$3,300 in cash. Additionally, a piece of mirror, a small white tube, and a razor blade were found on top of a barrel in the back of the shop. The search of the mobile home revealed an electronic Ohaus scale, a small baggie of cocaine, and \$660 in twenty dollar bills. The search also revealed a bindle [sic] of cocaine marked "1/2" as well as a baggie of marijuana.

Austin pleaded guilty in state court to one count of possession of cocaine with intent to distribute. Shortly thereafter, the federal government initiated civil forfeiture proceedings against Austin's body shop and mobile home pursuant to 21 U.S.C. §§ 881(a)(4) and 881(a)(7) (1988).² Austin resisted the government's attempt to seize

² 21 U.S.C. § 881(a)(4) permits the government to seize "[a]ll conveyances . . . which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of" illegal drugs or drug paraphernalia. Section 881(a)(7) authorizes forfeiture of "[a]ll real property . . . in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" certain drug related crimes.

his property. The government moved for summary judgment and supported its motion with an affidavit describing the Engebretson sale, the search of the property, and Austin's subsequent plea and conviction. Austin submitted an affidavit stating, in relevant part, that the gun found in his body shop was used to shoot sparrows and that he received no money from Engebretson on June 13, 1990. The district court granted the government's motion for summary judgment and this appeal followed.

II. DISCUSSION

A. Summary Judgment

"In reviewing a district court's grant of summary judgment, this court applies the same standard as the district court and views the facts in the light most favorable to that nonmovant, giving it the benefit of all reasonable inferences to be drawn from the facts." *Woodsmith Publishing Co. v. Meredith Corp.*, 904 F.2d 1244, 1247 (8th Cir. 1990). Summary judgment is appropriate only if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Mandel v. United States*, 719 F.2d 963, 965 (8th Cir. 1983).

In the context of a civil forfeiture proceeding, the government carries the initial burden of establishing probable cause; that is, it must "establish only that reasonable grounds exist to believe that the [property was] used or intended to be used for prohibited purposes." *One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 761 (8th Cir. 1986). The necessary level of proof is greater than mere suspicion, but is less than prima facie proof. *United States v. Premises Known as 3639-2nd Street N.E.*,

869 F.2d 1093, 1095 (8th Cir. 1989). Once the government meets this burden, "the burden shifts to the party opposing forfeiture to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture or that a defense to forfeiture is applicable." *Id.* The claimant cannot meet this burden by simply resting on his or her pleadings; instead, the claimant "must set forth specific facts by affidavits or otherwise showing that there is a genuine issue for trial." *One Blue 1977 AMC Jeep*, 783 F.2d at 762. "If unrebutted, a showing of probable cause alone will support forfeiture." *Id.* at 761.

In the present case, the government met its initial burden. The affidavit offered to support the summary judgment motion demonstrated reasonable grounds to believe both the mobile home and the body shop were used to facilitate illegal drug activity. The body shop was used as a place to meet a prospective customer, conduct negotiations, and complete a drug transaction. The affidavit also tends to support the inference that the mobile home was used as a place to store drugs. The character of these activities constitutes a sufficient connection with the prohibited conduct to enable the government to meet its initial burden.

Thus, the burden shifted to Austin. Austin's affidavit does not address, much less rebut, the essential elements of the government's affidavit. Even crediting Austin's claims that the revolver was used to shoot birds and that Engebretson did not pay any money at the time the drugs were transferred, Austin's affidavit does not dispute the government's claim that Austin sold drugs at the body shop. Similarly, Austin does not counter any of the facts tending to demonstrate the mobile home was used to

store drugs.³ Having failed to carry his burden, and having failed to raise any genuine factual issues, we conclude there were no material facts in dispute and summary judgment in favor of the government was appropriate.

B. Eighth Amendment

Austin contends the provisions of § 881 are unconstitutional as applied to him because the seizure of his business and home violates the Eighth Amendment. The government contends the Eighth Amendment does not apply because this is a civil forfeiture action. We reluctantly agree with the government. We say "reluctantly" because we believe that the principle of proportionality is a deeply rooted concept in the common law as stated and described in *Solem v. Helm*, 463 U.S. 277, 284, 290-92, 103 S.Ct. 3001, 3009-11, 77 L.Ed.2d 637 (1983), and that as a modicum of fairness, the principle of proportionality should be applied in civil actions that result in harsh penalties. However, we are restrained from so holding because of the decisions in prior cases on this issue hereinafter discussed.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Austin

³ Austin does contend the amount of drug activity on these premises was, at best, minimal. He also points out the property represents a significant portion of his limited wealth. However, these arguments are not relevant in determining whether there was a connection or nexus between the property and the illegal conduct. *Premises Known as 3639-2nd Street*, 869 F.2d at 1096.

contends the district court should have conducted a proportionality analysis as required by *Solem* to determine whether the value of the property forfeited was "grossly disproportionate" to the illegal drugs located, and the illegal activity occurring, on the property.⁴ However, the nature of a civil forfeiture proceeding renders the Eighth Amendment's proportionality analysis inappropriate.

A civil forfeiture is not an action *in personam*; instead, it is an action *in rem*. Because the government is proceeding against the "offending" property, the guilt or innocence of the property's owner is constitutionally irrelevant, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-87, 94 S.Ct. 2080, 2091-94, 40 L.Ed.2d 452 (1974); yet Austin seeks, under the guise of proportionality review, to have the district court consider the seriousness of his illegal conduct and other matters relating to his culpability vis-a-vis the forfeiture of his property. We are constrained to agree with the Ninth Circuit that "[i]f the constitution allows *in rem* forfeiture to be visited upon innocent owners . . . the constitution hardly requires proportionality review of forfeitures. . . ." *United States v. Tax Lot 1500*, 861 F.2d 232, 234 (9th Cir. 1988), *cert. denied*, 493 U.S. 954, 110 S.Ct. 364, 107 L.Ed.2d 351 (1989). The focus in an *in rem* action is the guilt or innocence of

⁴ In *Harmelin v. Michigan*, ___ U.S. ___, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), one plurality of the Court expressed a desire to overrule *Solem*, while a majority of the Court either declined to overrule *Solem* or explicitly approved of *Solem*. See *United States v. Johnson*, 944 F.2d 396, 408-09 (8th Cir.) (discussing the individual Justices' views), *cert. denied*, ___ U.S. ___, 112 S.Ct. 646, 116 L.Ed.2d 663 (1991). Nothing in this opinion should be construed as addressing *Harmelin's* effect on *Solem*.

the property; the owner's culpability apparently is therefore not a factor.⁵

In addition to adopting the Ninth Circuit's analysis, we agree with its observation that it appears incongruous to "require[] proportionality review for forfeitures when the government proceeds *in personam*, but not when the government proceeds *in rem*." *Id.* Legal niceties such as *in rem* and *in personam* mean little to individuals faced with losing important and/or valuable assets. *United States v. Twelve Thousand, Three Hundred Ninety Dollars*, 956 F.2d 801, 808-09 (8th Cir. 1992) (Beam, J., dissenting). We do not condone drug trafficking or any drug-related activities; nonetheless, we are troubled by the government's view that *any* property, whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction. A case supporting Austin's position could be made on the

⁵ We decline to follow the analysis employed in *United States v. One 107.9 Acre Parcel of Land*, 898 F.2d 396, 400-01 (3d Cir. 1990) and *United States v. Santoro*, 866 F.2d 1538, 1543-44 (4th Cir. 1989) because those cases utilized a framework designed to distinguish between criminal and civil proceedings. We are not convinced application of the Eighth Amendment depends solely upon whether the statute is classified as criminal or civil. See *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 263-64, 109 S.Ct. 2909, 2914, 106 L.Ed.2d 219 (1989) ("[W]e need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.").

bases of the history of the Eighth Amendment as set out in *Browning-Ferris*, 492 U.S. at 266, 109 S.Ct. at 2915:

The Eighth Amendment clearly was adopted with the particular intent of placing limits on the powers of the new Government. "At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection for persons convicted of crimes. This criticism provided the impetus for inclusion of the Eighth Amendment in the Bill of Rights." *Ingraham v. Wright*, 430 U.S. [651] at 666 [97 S.Ct. 1401, 1409-10, 51 L.Ed.2d 711 (1977)] (footnote omitted). . . . Simply put, the primary focus of the Eighth Amendment was the potential for governmental abuse of its "prosecutorial" power, not concern with the extent or purposes of civil damages.

In this case it does appear that the government is exacting too high a penalty in relation to the offense committed, but we are limited by the technical legal distinctions regarding *in personam* and *in rem* actions, together with the clear court decisions that the Constitution does not require proportionality – at least, not in civil proceedings for the forfeiture of property.

In spite of the fact that the Constitution does not require consideration of the owner's fault, Congress has wisely allowed the owner's innocent lack of knowledge of illegal activity to serve as a defense to forfeiture. 21 U.S.C. §§ 881(a)(4)(C), 881(a)(7) (1988). We sincerely hope Congress reexamines § 881 and considers injecting some sort of proportionality requirement into the statute, even though the Constitution does not mandate such a result.

III. CONCLUSION

After reviewing the record *de novo*, we conclude Austin failed to raise a substantial issue of fact, and summary judgment in favor of the government was appropriate. We also hold the Eighth Amendment does not require that the district court conduct any type of proportionality analysis in a civil forfeiture proceeding. Consequently, we affirm the district court.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

The suggestion for rehearing en banc is denied. Judge McMillian and Judge Beam would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

July 2, 1992.

Supreme Court of the United States

No. 92-6073

Richard Lyle Austin,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the
United States Court of Appeals for the Eighth Circuit.

ON CONSIDERATION of the motion for leave to
proceed herein in forma pauperis and of the petition for
writ of certiorari, it is ordered by this Court that the
motion to proceed in forma pauperis be, and the same is
hereby, granted; and that the petition for writ of certiorari
be, and the same is hereby, granted. The brief of the
petitioner must be received by the Clerk and served upon
opposing counsel on or before 3:00 p.m., March 1, 1993.
The brief of the respondent must be received by the Clerk
and served upon opposing counsel on or before 3:00 p.m.,
March 31, 1993. A reply brief, if any, must be received by
the Clerk and served upon opposing counsel on or before
3:00 p.m., April 12, 1993. Rule 29 does not apply. The case
is set for oral argument during the Session beginning
April 19, 1993.

January 15, 1993
